Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1976

No. 76-460

FRED F. FRENCH INVESTING COMPANY, INC.,

Appellant,

-against-

THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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Appellee ("City") moves to dismiss the appeal on the ground that it presents no substantial federal question.

Finality

The judgment of the court of first instance, which in effect has been affirmed by the New York Court of Appeals, denied

appellant's motion for summary judgment (10),* but it did not necessarily preclude a recovery after trial. The Court of Appeals observed that there had been no taking by title or governmental occupation, nor physical invasion, nor assumption by the City of the control or management of the land, factors in the absence of which there had been "no 'taking' within the meaning of constitutional limitations" (8a). But that was on the record made on a motion for summary judgment. The judgment here under review does not preclude a trial to establish the presence of such factors.

*Numbers in parentheses refer to pages of the Record, except when followed by "a", where they refer to pages of the appendix to the jurisdictional statement.

Question Presented

New York City enacted a zoning classification which purported to open two privately owned parks to limited access by the public. The change was soon judicially declared to be facially void for the reason that the owners were deprived of all reasonable use of the property, the development rights retained by them being held worthless as matter of law. The same judgment restored the prior zoning classification.

The question presented is whether, given the additional facts regarding use and control which are noted below, there was a taking of the property in eminent domain for which compensation is constitutionally mandated.

Facts

The zoning change was enacted on December 7, 1972. The action was

started on February 23, 1973. The change was declared void on December 31, 1973 (13, 1, 146).

Appellant does not quarrel with the observation of the Court of Appeals that (8a) "there was no actual appropriation or taking . . . by title or governmental occupation . . . no physical invasion of the owner's property . . . [and] the parks served the same function as before the amendment, except that they were now also open to the public". Nor do they question that Court's statement (ibid.) that there was no "assumption by the City of the control or management of the parks" except to urge that the mere fact of the enactment was such an assumption. Cf. Jurisdictional Statement, p. 15, footnote.

To the observations of that Court we add that the owners themselves acted as if the amendment were a nullity. Without waiting for a decision in their suit, they continued to exclude the public from the park (124-126, and photographs following). There was no evidence that any official action attributable to the enactment impeded the owners in their use of the land.

ARGUMENT

(a)

The zoning change had no practical effect. It was a de facto nullity, and so it remained until it was judically declared to be what it had been from the beginning. Nor was a trial required. The amendment was held to be invalid on its face. Under such circumstances there was no taking, and there is no substance to

the question presented.

This Court has refused to review the dismissal of one count of a complaint which pleaded a taking by reason of the confiscatory effect of a zoning change challenged in another count of the same complaint. Mailman Development Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. App., 1974), cert. den. 293 So. 2d 713, cert. den. 419 U.S. 844.

The "academic debate" referred to at page 10 of the Jurisdictional Statement, to the extent that it deals with constitutional mandate as distinct from what is urged as desirable public policy, is largely about the point at which a diminution of property values reaches the "certain magnitude" referred to in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922), when "there must be an

exercise of eminent domain and compensation to sustain the act". In this case that issue has already been decided in favor of appellant.

Appellant presses a different proposition. It is that, when it appears upon the face of police power legislation that it would be confiscatory if effectuated, the Due Process Clause gives the property owner an option: to obtain judicial nullification or, against the wishes of the enacting government, to permit the legislation to remain in effect and compel public purchase of the property.

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APPELLANT'S REPLY MEMORANDUM

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APPELLANT'S REPLY MEMORANDUM

Reply to the City's motion to dismiss is required as to substantiality and finality.

Substantiality

By restating the issue as whether the owner has an option to obtain judicial nullification of the ordinance or compel public purchase against the wishes of the enacting government, the City seeks to reduce the probability that

this Court will find substantially. In doing so, however, it has misstated the legal proposition presented by appellant.

The New York Court of Appeals held that absent "governmental displacement of private ownership, occupation or management, there was not 'taking'". Appellant's argument in outline is:

1. The operation or effect of the ordinance is for this this Court to determine (Jurisdictional Statement, p. 15).

2. The mandate of public use itself constitutes an assumption by the City of control of the land, a present invasion of appellant's right to own and manage,* which added the property to the public use (Ibid., pp. 13, 15).

3. Whether unintended or deliberate, an acquisition for public use through use of the zoning power constitutes a taking for which compensation must be paid.

In that context, it is immaterial that appellant seeks compensation "against the wishes of the enacting government." Compensation is due because that government is constitutionally required by reason of the enactment to pay compensation. In that context it is likewise immaterial that appellant could have waived its right to compensation and asked instead for judicial nullification. It did not do so and cannot be required to do so because the

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* That the City had not taken official action other than the ordinance which impeded he owners in the use of the land is irrelevant, since the enactment of the ordinance itself for the purpose of enhancing public resources constituted the taking, without more. Nor is it material, if true, that the owners continued to exclude the public from the park, for appellant French's mortgage security was impaired by enactment of the ordinance, and acts of the owners (North Assemblage Company and South Assemblage Company) in violation of the ordinance would not be binding on French.

Fifth Amendment's compensation clause as made applicable to the City by the Fourteenth Amendment requires that compensation be paid to appellant. Phrasing the issue as the City has obscures the true constitutional issue, which is whether adding private property to public resources constitutes a taking in eminent domain.

Nor is it realistic to argue as does the City in its motion to dismiss that

> "(t)he zoning change had no practical effect. It was a *de facto* nullity and so it remained until it was judicially declared to be what it had been from the beginning."

If, indeed, the enactment constitutes a taking then, the rule being that a statute is required to be construed in favor of its constitutionality, the judicial declaration should be that compensation is owed, not that the ordinance is a nullity. In *Lomarch Corp.* v. *Mayor and Common Council of City of Englewood,* 51 N.J. 108, 273 A. 2d 881, which like the instant case involve reservation of private lands for public park purposes, the Supreme Court of New Jersey did just that, and it is that which this Court is asked to pass upon. To suggest that an ordinance which had the effect of tying up land in litigation for over four years,* during which, as this court can judicially notice, *Erdreich* v. *Zimmerman,* 190 App. Div. 443, 449-450; see *Zimmerman* v. *Roessler & Hasslocker Chemical Co.,* 240 N.Y. 501, the real estate market declined

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* The City's suggestion that "The change was declared void on December 31, 1973" and thus that the effective life of the ordinance was but one year, overlooks the fact that the City appealed and that its appeal automatically stayed the effectiveness of Special Term's declaration of invalidity, until May 4, 1976, the date of the Court of Appeals order herein, New York CPLR 5519(a) and (e).

very substantially from what it was on December 7, 1972 when the parks were mapped as "P" District, "had no practical effect" is to ignore reality. Indeed, the recognition by the New York Court of Appeals of the destructive economic effect of the ordinance (Jurisdictional Statement, p. 13a) is corroboration of the intensely practical effect that enactment of the ordinance had.

Moreover, this Court's denial of certiorari in *Mailman Development Corp.* v. *City of Hollywood,* 419 U.S. 844 is not dispositive of the question of substantiality. *Mailman* did not involve the use of the zoning power to enhance public park resources. It, like *HFH Ltd.* v. *Superior Court,* 424 U.S. , 96 S. Ct. 1495, concerned only whether the reduction of value occasioned by enactment of a zoning ordinance constitutes a taking. That *Mailman* did not involve use of a zoning ordinance to enhance government resources, if not clear from the Florida Appeals Court's decision (286 So.2d 614), is clearly indicated by that court's citation of *City of Miami* v. *Romer,* 58 So.2d 849, and its omission of any reference to the later decision in the same case, reported in 73 So. 2d 285, which held that an action for damages *would* lie where the purpose of an ordinance prohibiting construction within twenty-five feet of the center line of a given street was to enable the city ultimately to acquire property without having to pay for the improvements that otherwise might be erected on it, that is, was to enhance public resources.

Finality*

The City argues that the order appealed from is not final because denial of appellant's motion for summary judgment does not preclude recovery by appellant after a trial at which evidence of governmental displacement of private ownership may be presented.

The decisions of this Court establish that where nothing more remains to be done than the mechanical entry of judgment by the trial court there is finality, *Pope* v. *Atlantic Coast Line R.Co.,* 345 U.S. 379; *Department of Banking* v. *Pink,* 317 U.S. 264, and that on the question of finality this Court is not bound by the face of the judgment, *Local No. 548* v. *Curry,* 371 U.S. 544; *Pope* v. *Atlantic Coast Line R.Co., supra; Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, and will accept an appellant's concession that he has no further factual or legal issues to present to the trial court on remand, *Mills* v. *Alabama,* 384 U.S. 214, 217; *Local No. 438* v. *Curry, supra,* at 551; *Pope* v. *Atlantic Coast Line R.Co., supra,* at 382, especially when the question will, in any event, return to this Court after entry of judgment by the trial court, *Mills* v. *Alabama, supra,* at 217; see *National Association for the Advancement of Colored People* v. *Williams,* 359 U.S. 550. Appellant French concedes that it has no evidence of governmental displacement other than the enactment of the ordinance mandating that the property "shall be open to the public at least from 6:00 A.M. to 10:00 P.M. daily." When that concession is made to the Supreme Court of New York County, it will be required by the Court of Appeals' decision herein to enter judgment dis-

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* The finality question raised by the City's motion to dismiss as to the additional "temporary damage" issue raised by appellants other than French has no bearing on the finality of the judgment below as to the taking issue raised by French.

missing the first cause of action of the complaint and the appeal, if now dismissed for want of finality, will be once again presented to this Court. On that concession this Court, on the basis of the above-cited precedents, should hold that there is finality.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Dated: New York, New York
November 1, 1976

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